In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 346

HICKMAN GARMENT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. A1–A2) is reported at 408 F. 2d 379. The Board's decision and order (Pet. A2–A47)[1] are reported at 172 NLRB No. 118.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1969 (Pet. A1–A2). The petition for a writ of certiorari was filed on July 16, 1969. The juris-

[1] The Board's decision and order are also reprinted at J.A. 17a–61a. "J.A." references herein are to the joint appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that an employer violated Section 8(a)(1) of the Act by discharging a group of employees because they left their work stations to protest the elimination of their afternoon work break and to discuss their grievance with the employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*), are set forth at pages 2–3 of the petition.

STATEMENT

1. Petitioner is owned and operated by Phillip Roseman, its president, and his wife Nettie, its secretary (J.A. 19a, 179a–180a). In 1967, the Company was engaged in the manufacture of military raincoats for the government at a plant in Hickman, Kentucky, where its work force consisted of about 250 employees (J.A. 19a; 99a–100a). These employees had been unrepresented by any union, but the Amalgamated Clothing Workers of America, AFL–CIO, began organizational efforts at the plant in early January 1967, and it solicited authorization cards from the employees on January 31 and thereafter (J.A. 20a–21a; 66a–69a).

For almost twelve years prior to February 1, 1967, the Company had permitted its employees to take a ten-minute break each morning and afternoon in four groups at staggered intervals (J.A. 21a; 72a, 101a,

115a). On January 31 and with no other advance notice, the Company announced that the afternoon break would be eliminated as of the next day because the "new national [minimum] wage affords us very little room for any breaks or interruptions which hampers our production schedules" (J.A. 21a–22a; 101a–102a, 196a).

On the afternoon of February 1, some of the employees in the second group went to the lunchroom to take their break. While they were drinking soft drinks and smoking, Company President Roseman appeared. He informed them that "He was going to sue us, that this was mutiny, it was a wildcat strike, and that he was going to get rid of all of us, but right at the moment to get back to our machines" (J.A. 28a; 73a, 126a–127a). The employees thereupon returned to work (*ibid.*).

Subsequently, employees in the fourth group decided to go to the lunchroom "to take our break and to talk to Phil [Roseman] and ask him why he was taking our break away from us" (J.A. 22a, 30a; 142a, 154a). As they approached the lunchroom, they noticed that the entrance was barricaded by benches and that Roseman and a supervisor were standing in front of the ladies' room. The employees removed the benches and entered the lunchroom in order "to talk to the man [Roseman]" about the elimination of the afternoon break (J.A. 22a; 142a, 154a). Roseman followed the employees into the lunchroom, "started flinging his hands around," and told the employees they were committing "mutiny" and acting like they were on strike (J.A. 22a; 154a, 129a–130a). When several employees

complained and attempted to question Roseman about loss of their break, he replied that there was nothing to discuss since he had already made his decision (J.A. 22a–23a; 130a, 154a). Additionally, he threatened to sue the employees and, referring to the Company's military contracts, warned "that he was going to call the Federal Government" (J.A. 23a; 154a, 142a, 130a). When one of the employees retorted, "Well, while you're at it call the National Labor Relations Board," Roseman told her that she was "fired" and punched her time clock card out (J.A. 23a; 154a, 130a).

Roseman ordered the employees to return to work, but they again urged him to compose himself and discuss their grievance (J.A. 24a–26a, 30a; 130a). Roseman refused, stating "There is nothing to talk about," and shouted "You are all fired" (J.A. 24a–26a, 30a; 130a, 142a, 147a). He then proceeded to clock the protestors out as they left the plant (J.A. 28a; 131a, 142a).

Several employees who were not in the lunchroom learned what had occurred and left the plant with the employees who had been fired (J.A. 26a; 95a, 97a–98a). One employee, Beverly Callison, who had taken her break earlier with the second section and had returned to work when ordered by Roseman to do so, sought Roseman out in a further attempt to discuss the situation. He responded by discharging her (J.A. 28a; 73a–74a).

2. The Board held that the employees' effort on February 1, 1967, to discuss the elimination of their afternoon work break with Roseman, including their entrance into the lunchroom for that purpose, was

protected concerted activity, and that the Company violated Section 8(a)(1) of the Act by discharging sixteen employees for engaging in such activity (J.A. 30a–31a, 50a–51a, 60a). The Board also found that the two employees who voluntarily left the plant to make common cause with the employees who were discharged occupied the status of unfair-labor-practice strikers and were unlawfully denied reinstatement by the Company when they sought to return to work on the following day (J.A. 51a). The Board, *inter alia*, ordered the Company to offer reinstatement to the eighteen employees and to make them whole for any loss of pay suffered as a result of the Company's unlawful conduct (J.A. 55a, 60a).[2]

The court of appeals, in a *per curiam* order, held that the Board's findings and conclusions were supported by substantial evidence on the record as a whole, and enforced the Board's order (Pet. A1–A2).

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[2] The Board further found that the Company violated Section 8 (a)(3) and (1) of the Act by failing to reinstate four of the protesters, following their unconditional request for reinstatement on February 2, because they were known union activists; and by discharging two other employees on February 22 and April 6, respectively, because of their union activities. Additionally, the Board found that the Company violated Section 8(a)(1) of the Act by requesting employees to solicit other employees to renounce the Union; by coercively interrogating employees; by various threats to employees that, if they engaged in protected activities, they would be replaced and barred from further employment, the plant would be closed, they would be prevented from drawing unemployment benefits, and wages would be reduced; and by promising employees increased benefits if the Union was not selected as bargaining agent (J.A. 52a–56a). Petitioner does not challenge these findings and conclusions (Pet. 5).

ARGUMENT

1. In the exercise of their statutory right to engage in concerted activities for mutual aid or protection, employees may walk out or stop work in protest over conditions of employment and an employer may not lawfully discharge them for such conduct. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9. Applying this settled principle, the Board, with the approval of the court of appeals, correctly found that, in stopping work to protest the elimination of the afternoon work break, the employees engaged in concerted activity that the Act protects. Petitioner's argument is that, because the employees did not strike but took the less drastic step of attempting to discuss their grievance with their employer during working hours and on Company property, they forfeited the statutory protection. But the "language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike." Nor does the fact "[t]hat the employees suddenly dropped their tools and insisted upon presenting their grievances during working hours * * * detract from the lawfulness of their conduct. * * * In fact, what the workmen did was more reasonable and less productive of loss to all concerned than an outright strike." *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 819 (C.A. 3). As this Court stated in *Washington Aluminum, supra,* the "activities engaged in here do not fall within the normal categories of unprotected concerted activities such as

those that are unlawful, violent, or in breach of contract. Nor can they be * * * classified as 'indefensible' by any recognized standard of conduct." 370 U.S. at 17 (footnotes omitted).

2. Contrary to petitioner's assertion (Pet. 6), there is no conflict of decisions. In *C. G. Conn, Ltd.* v. *National Labor Relations Board,* 108 F. 2d 390, 395 (C.A. 7) (Pet. 8–9), the employees refused to work scheduled overtime one evening and indicated "that they intended to do the same each evening until their request [relating to rates of pay and overtime work] was granted." *In Home Beneficial Life Ins. Co.* v. *National Labor Relations Board,* 159 F. 2d 280, 286 (C.A. 4), certiorari denied, 332 U.S. 758 (Pet. 9), the insurance agents did not join a strike conducted by other agents and continued to perform their duties, except that they refused to report to their respective offices before beginning their outside work, as required by a company rule. In *National Labor Relations Board* v. *Montgomery Ward & Co.,* 157 F. 2d 486, 496–497 (C.A. 8) (Pet. 7), clerical employees agreed not to process orders from their employer's Chicago plant, which was on strike, but continued to process all other orders. Thus, in each of these three cases the discharged employees had pursued, or intended to pursue, a continuing course of conduct whereby they would meet some of their job requirements and remain on the payroll while refusing to meet others. By contrast, the instant case presents no comparable pattern of protest activity, for the employees here merely engaged in a brief work stoppage for the purpose of protesting the elimination of the

afternoon break and presenting their grievance to their employer.[3]

National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, and *McNeely & Price Co.* v. *National Labor Relations Board*, 106 F. 2d 878 (C.A. 3), cited by petitioner (Pet. 9–11), are inapposite. Those cases involved sitdown strikes, *i.e.*, the forceful seizure and retention of the employer's plant and property by striking employees in defiance of orders to leave. The facts here show no action of even remote similarity on the part of the employees; indeed, they left the employer's premises peacefully when directed to do so (*supra*, p. 4). Nor is *Dobbs Houses, Inc.* v. *National Labor Relations Board*, 325 F. 2d 531 (C.A. 5) (Pet. 6–7), in point.

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[3] This distinction is not inconsistent with the position taken by counsel for the Board in *First National Bank of Omaha* v. *National Labor Relations Board* (C.A. 8, No. 19,356), as petitioner claims (Pet. 11). Rather, it is precisely the same as was urged in the Board's brief there—that, on the one hand, "when employees adopt a continuing strategy of work stoppages or refusals to perform assigned tasks * * * their activity may become 'indefensible' and lose its protected status" (Pet. A51); on the other hand, however, "[t]his exception to the broad guarantees embodied in Section 7 does not, however, authorize an employer to use the penalty of discharge to punish employees for engaging in a single, concerted work stoppage of limited duration in protest over working conditions" (Pet. A50). On July 22, 1969, the court of appeals in the *First National Bank case* affirmed the Board's finding that employees who protested a requirement that they work overtime by walking off their jobs an hour early were engaged in protected activity for which they could not be lawfully discharged (71 LRRM 3019). The court distinguished the *C. G. Conn*, *Home Beneficial Life*, and *Montgomery Ward cases*, *supra*, on substantially the same grounds as we suggest here (slip opinion, pp. 4–6, 71 LRRM at 3020–3021).

There, unlike here, the court concluded that the employees' protest was directed, not to their own terms and conditions of employment, but to the discharge of a supervisor and was, therefore, not protected activity. 325 F. 2d at 537, 539.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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